

BEFORE THE U.S. DEPARTMENT OF THE INTERIOR**U.S. BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C.**

**Data Quality Act Request for Action on the Bureau of Land Management's
"Report on National Greater Sage-Grouse Conservation Measures"**

Prepared and Submitted by: Western Energy Alliance

Dated: July 30, 2013

I. INTRODUCTION

This request is made pursuant to the "Data Quality Act" (Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153-154 (2000)) ("DQA") and was prepared and submitted by Western Energy Alliance ("Western Energy"), which is a non-profit, regional trade-association representing more than 400 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West.

Western Energy requests action on the part of the Bureau of Land Management ("BLM") to rectify the informational deficiencies related to the peer review of the "Report on National Greater Sage-Grouse Conservation Measures" produced by the Sage-grouse National Technical Team (Dec. 21, 2011) ("NTT Report"). The NTT Report is a highly influential report synthesizing extensive research on sage-grouse conservation assembled by a team of experts that was, and is, heavily relied-upon by the U.S. Fish and Wildlife Service ("FWS") in its decision-making with respect to the greater sage-grouse under the Endangered Species Act. The FWS's decision-making with respect to the greater sage-grouse will have direct and concrete effects upon Western Energy's members.

It is understood that the NTT Report has been subject to peer review. However, in direct contravention of the DQA, the Office of Management and Budget ("OMB"), and BLM's own guidance issued pursuant thereto, it appears that the BLM has failed to employ proper and necessary public transparency mechanisms. In order to rectify these informational deficiencies, Western Energy requests the BLM provide specific and detailed information regarding the peer review process employed with respect to the NTT Report, including, but not limited to the information requested in section III, below.

II. LEGAL FRAMEWORK

Under the DQA, Congress directed the OMB to issue guidelines to "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity of information" disseminated by federal agencies. Pub. L. No. 106-554, § 515(a). The DQA was based on the federal government's recognition that "[b]ecause the public disclosure of government information is essential to the operation of a democracy, the management of [f]ederal information resources should protect the public's right of access to

government information.” OMB, Circular No. A-130 Revised, Memorandum for Heads of Executive Departments and Agencies: Management of Federal Information Resources, 7.f. (originally issued Feb. 8, 1996).

The OMB issued the required guidance in several stages with the final version issued in the February 22, 2002 Federal Register. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Notice; Republication, 67 Fed. Reg. 8452 (Feb. 22, 2002) (“OMB Guidance”). The OMB provided further guidance regarding proper peer review procedures and public transparency thereof in a subsequent memorandum issued in 2004. OMB, Memorandum for Heads of Department and Agencies: Issuance of “OMB’s Final Information Quality Bulletin for Peer Review” (Dec. 16, 2004) (“OMB Bulletin”).

As required by the OMB Guidance, each federal agency was required to issue its own, agency-specific DQA implementing guidelines. OMB Guidance at 8452 (§ II.1.); *see also* Information Quality Guidelines Pursuant to Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, 67 Fed. Reg. 36642 (May 24, 2002). The BLM complied with this requirement by issuing its own DQA guidance, the most recent of which was issued in 2012. BLM, Information Quality Guidelines (Feb. 9, 2012) (“2012 Guidelines”). Recognizing however, that its 2012 Guidelines were not fully compliant with the OMB Bulletin, the BLM issued a memorandum specifically regarding peer review in 2013. BLM, Assistant Director, Information Resources Management, Peer Review of Influential Scientific Information (June 6, 2013) (“BLM Memorandum”).¹ In the BLM’s Memorandum, the BLM committed to circulate new guidelines that would include amended procedure for peer review within the next year. *Id.*

As set forth below, each of these forms of guidance provide clear and unavoidable public transparency requirements relevant to this request.

A. OMB Guidance

The OMB Guidance focuses on four key characteristics of information dissemination by a federal agency: quality, utility, objectivity, and integrity. 67 Fed. Reg. 8453, 58, 59. As explained below, under the OMB Guidance, a primary component of utility and objectivity is public transparency.

“Utility” is defined by the OMB as “the usefulness of the information to its intended users, including the public”; accordingly,

the agency needs to consider the uses of the information not only from the perspective of the agency but also from the perspective of the public. As a result, when transparency of information is relevant for assessing the information’s usefulness from the public’s perspective, the agency must take care to ensure that transparency has been addressed in its review of the information. *Id.* at 8453 (OMB Guidance V.2.).

¹ Available at:

http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2013/im_2013-137_peer.html.

Similarly, the “objectivity” requirement provides that,

the agency needs to identify the sources of the disseminated information (to the extent possible, consistent with confidentiality protections) and, in a scientific, financial, or statistical context, the supporting data and models, so that the public can assess for itself whether there may be some reason to question the objectivity of the sources. *Id.* (OMB Guidance V.3.a.).

With respect to objectivity and peer reviews, the information subject to peer review may generally be presumed to be of “acceptable objectivity”; however, this presumption is expressly rebuttable. *Id.* at 8459 (“...this presumption is rebuttable based on a persuasive showing by the petitioner in a particular instance.”). The fact that the presumption of objectivity is rebuttable lends itself to the disclosure of the peer reviewers’ identity, credentials, and other relevant information; after all, what possible showing could the public make that would serve to rebut the presumption of objectivity if this information is withheld?

Furthermore, if peer review is used to satisfy the objectivity standard, “it shall meet the general criteria for competent and credible peer review” recommended by the OMB—[Office of Information and Regulatory Affairs],” namely:

[T]hat (a) peer reviewers be selected primarily on the basis of necessary technical expertise, (b) peer reviewers be expected to disclose to agencies prior technical/policy positions they may have taken on the issues at hand, (c) peer reviewers be expected to disclose to agencies their sources of personal and institutional funding (private or public sector), and (d) peer reviews be conducted in an open and rigorous manner.” *Id.* at 8459 – 60 (OMB Guidance V.3.b.i.).

Thus, if the public is to have assurance that the peer reviewers selected by the federal agency serve both the utility and objectivity standards set by the OMB’s Guidance it must (at the very least) disclose to the public the peer reviewers’ expertise, prior positions, and sources of funding, and in a scientific context, such as with the NTT Report, data and models relied upon by the peer reviewers.

B. OMB Bulletin

The OMB Bulletin establishes “government-wide guidance aimed at enhancing the practice of peer review of government science documents.” Joshua B. Bolton, Director, OMB, Memorandum for Heads of Departments and Agencies (Dec. 16, 2004). Specific to certain, “influential scientific disseminations” and “highly influential scientific assessments,” a subset of influential scientific disseminations, the OMB Bulletin sets forth “stricter minimum requirements” in particular with respect to public transparency. OMB Bulletin at 2.

Influential scientific information “means scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.” *Id.* at 11. A “highly influential scientific assessment” is a “an evaluation of a body of scientific or technical knowledge that typically synthesizes multiple

factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information.” *Id.* at 2. The NTT Report clearly falls within the scope of these definitions and therefore the higher minimum requirements with respect to public transparency, explained below, are applicable.

To begin with, influential scientific information must be subject to peer review prior to dissemination. *Id.* at 12. However, not just any peer reviewer will do, the agency must ensure the peer reviewers selected must: possess the appropriate knowledge, experience, and skills set (expertise); be representative of a diversity of relevant perspectives (balance); not be associated with the production of the document which they are reviewing (independence); and have no conflict of interest that would impair their objectivity (conflict of interest). *Id.* at 16 – 18.

Moreover, after observing that “[t]he public may not have confidence in the peer review process when the names and affiliations of the peer reviewers are unknown,” with respect to influential scientific disseminations, the OMB requires the disclosure of the identity of the peer reviewers and affiliations to the public. *Id.* at 20 – 21, 37 (“The agency shall disclose the names of the reviewers and their organizational affiliations in the report.”).

Above and beyond these requirements, “an agency conducting a peer review of a highly influential scientific assessment must ensure that the peer review process is transparent by making available to the public the written charge to the peer reviewers, the peer reviewers’ names, the peer reviewers’ report(s), and the agency’s response to the peer reviewers’ report(s).” *Id.* at 3. In addition, peer reviewers of highly influential scientific assessment are required to:

[P]repare a peer review report that describes the nature and scope of their review and their findings and conclusions. The report shall disclose the name of each peer reviewer and a brief description of his or her organizational affiliation, credentials and relevant experiences. The peer review report should either summarize the views of the group as a whole (including any dissenting views) or include a verbatim copy of the comments of the individual reviewers (with or without attribution of specific views to specific names). The agency shall also prepare a written response to the peer review report, indicating whether the agency agrees with the reviewers and what actions the agency has taken or plans to take to address the points made by reviewers. The agency is required to disseminate the peer review report and the agency’s response to the report on the agency’s website, including all the materials related to the peer review such as the charge statement, peer review report, and agency response to the review. If the scientific information is used to support a final rule then, where practicable, the peer review report shall be made available to the public with enough time for the public to consider the implications of the peer review report for the rule being considered. *Id.* at 26.

Thus, pursuant to the OMB Bulletin, the peer review process undertaken for the NTT Report is subject to higher and more rigorous public transparency requirements than other publicly disseminated information including the requirement that the BLM produce a disclosure report

setting forth, *inter alia*, the peer reviewers' comments (whether direct or summarized) and the agency's response to these comments.²

C. **BLM Guidance**

As previously stated, taking its cue from the OMB Bulletin, the BLM issued a Memorandum in June of 2013 summarizing its policy with respect to public transparency in the peer review process. The BLM Memorandum first recognizes that certain minimum peer review standards exist, including expertise, balance, independence, and no conflicts of interest. BLM Memorandum at Policy/Action.

The BLM Memorandum then goes on to recognize that there are "[a]dditional requirements for Highly Influential Scientific Assessments including opportunity for public participation" and that its current guidance is insufficient to meet this requirement. *Id.* Accordingly, the BLM promises that its 2012 Guidance will be "amended to include standardized procedures for peer review and will include definitions of influential scientific information and highly influential scientific assessments." *Id.* (internal quotations omitted).

In the meantime, the BLM Memorandum assures the public that its peer review process "will be transparent and publicly accessible" and "[i]f the peer review process is challenged under the [Data] Quality Act, the peer reviewer's name(s), the peer reviewer's report(s), and the agency's response to the peer reviewer's report(s) must be made public." *Id.* Thus, because the BLM's 2012 Guidelines are not fully compliant with the OMB Bulletin and new guidelines are still forthcoming, the requirements of the OMB Bulletin, set forth in section II above, must be considered controlling.

III. INFORMATIONAL DEFICIENCIES

Western Energy requests that the BLM comply with the OMB Guidelines, OMB Bulletin, and BLM Guidance with respect to its obligations to publicly disclose information related to the peer review process of the NTT Report. Disclosure of such information includes, but is not limited to the following:

1. The names and institutions of employment and/or affiliations (*e.g.*, university, scientific organization, corporation, agency, etc.) of all persons contacted for the purposes of providing peer review of the NTT Report.

² The OMB Bulletin provides a procedure by which an agency may employ "alternative procedures" in its peer review process. OMB Bulletin at 27 – 28, 41. These alternative procedures include reliance on report(s) produced by the National Academy of Sciences ("NAS"), peer review by the NAS, or other alternative procedures approved by the Administrator in consultation with the Office of Science and Technology Policy ("OSTP"). *Id.* Unless the BLM utilized the NAS in its peer review process, the BLM would have been required to gain the approval of the Administrator in consultation with the OSTP to utilize an alternative procedure with respect to peer review of the NTT Report. If the BLM did not gain such approval, peer review of the NTT Report should have proceeded according to the default procedure described in this section. In any case, the BLM should strive for the utmost public transparency possible to ensure dissemination of credible, unprejudiced information.

2. The names and institution of employment or affiliation (*e.g.*, university, scientific organization, corporation, etc.) of those who actually engaged in peer review of the NTT Report (the "Peer Reviewers").
3. The questions asked and/or issues presented to the Peer Reviewers with respect to the NTT Report.
4. Any formal or informal report(s), paper(s), data compilation(s), communication(s), comment(s), red-line(s), summary(ies) or other document type related to the Peer Reviewers' review or impressions of the NTT Report.

Thank you in advance for your attention to this matter. Correspondence regarding this request may be directed to the undersigned.

Respectfully submitted this 30th day of July, 2013.



Kathleen Sgamma
Western Energy Alliance
410 17th St., Ste 700
Denver, Colorado 80202
T: (303) 623-0897
E: ksgamma@westernenergyalliance.org